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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD M. NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF PETITIONERS HARLOW AND BUTTERFIELD TO THE MOTION OF JUDITH CLARK *ET AL.* TO INTERVENE AND FOR OTHER RELIEF

ELLIOT L. RICHARDSON
ADLAI S. HARDIN, JR.
GLENN S. GERSTELL
RICHARD P. SWANSON
MILBANK, TWEED, HADLEY & MCCLOY
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 466-4700
Counsel for Petitioners
Harlow and Butterfield

September 25, 1981

For the second time in as many months, another group of plaintiffs, faced with an immunity defense in the lower federal courts, has sought to intervene in this case. Like the plaintiffs in *Halperin* v. *Kissinger,* 452 U. S.—(June 22, 1981), the plaintiffs in *Clark* v. *United States,* 78 Civ. 2244 (S.D.N.Y.), urge this Court either to dismiss this case or to permit them to air their views on the merits. Both Halperins' and Clark's motions grow out of cases involving similar factual allegations—that President Nixon was in some way responsible for allegedly injurious and illegal wiretapping. Both motions are based on the same faulty legal reasoning—that this case is now moot and that the possible precedential impact of the case confers some "interest" upon these other plaintiffs entitling them to intervene here. This case is vigorously disputed by all parties and is in no way moot, and the *Clark* plaintiffs have as little right to intervene here as do the plaintiffs in *Halperin.* Clark's motion has no merit and should be denied.

I.

The *Clark* plaintiffs ask this Court to dismiss the writs of *certiorari* in *Nixon* v. *Fitzgerald,* No. 79-1738, and *Harlow and Butterfield* v. *Fitzgerald,* No. 80-945, as having been improvidently granted. Since both cases were consolidated by this Court, Clark's motion is nominally directed at all parties in the consolidated case. However, the real target of the motion is not Harlow and Butterfield, but rather President Nixon. The *Clark* plaintiffs simply seek to shift the forum of their complaint against the former President from the district court to this Court. Because President Nixon is also a co-defendant in the *Clark* litigation, what the plaintiffs in that case obviously fear is a ruling by this Court upholding Presidential immunity. They seek dismissal of the *Fitzgerald* case on the ground that President Nixon's agreement with Fitzgerald renders the case moot. Moreover, they claim that the alleged failure to disclose

the agreement constitutes a "deliberate fraud."* Both of these arguments have already been persuasively rebutted in President Nixon's Response to the Halperins' Motion.

However, as discussed in their Response to the Halperins' Motion (August 27, 1981), petitioners Harlow and Butterfield respectfully urge this Court, if it decides to dismiss President Nixon's case, to retain their case nevertheless and to decide the important and recurring issues of official immunity squarely presented by it.

II.

The *Clark* plaintiffs also seek to become a party in this case so that they may present their views on the merits of these important issues. Like the Halperins, they will not be bound by a judgment in this case, nor do they have any concrete interest that would be "impaired" or "impeded" by any outcome of this case. *See* Fed. R. Civ. P. 24(a). Instead, they assert a novel basis for intervention: a ruling by this Court on the immunity issues in this case might constitute precedent adverse to them in their district court litigation. Surely the fact that the district court would be obligated to follow a decision of a higher court cannot possibly bestow on litigants in the lower court a legally sufficient "interest" entitling them to intervene in a case in the higher court. Yet this is precisely the rationale—and indeed the only rationale—advanced by the *Clark* plaintiffs.

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* The *Clark* plaintiffs go so far as to make the irresponsible and disingenuous suggestion that Harlow and Butterfield themselves participated in the alleged "deliberate fraud." Clark Motion at 10-11. This is utterly without foundation and simply not true. As detailed in President Nixon's Response to the Halperins' Motion, the substance of the Fitzgerald agreement was disclosed in papers filed with this Court (and so a matter of public record) on June 10, 1980, six months before Harlow and Butterfield retained their present counsel and filed their own *certiorari* petition. Since the attorneys for Fitzgerald and the former President had agreed to keep the specific details of the agreement confidential, Harlow and Butterfield themselves did not find out the full nature of the agreement until its disclosure last month in connection with the Halperins' motion.

The *Clark* plaintiffs will have ample opportunity to distinguish the facts of the present case from their own in the courts below (and even seek *certiorari* in this Court) if it should prove necessary to do so. They have not suggested any reason why any position they might take in opposing a grant of official immunity here would not be adequately presented by respondent Fitzgerald. In any event, if they still want their views to be heard now in this case, they may move for leave to file an *amicus* brief.

CONCLUSION

The motion by the *Clark* plaintiffs is totally devoid of merit. Petitioners Harlow and Butterfield respectfully ask that it be denied, and that this Court decide the questions raised in *Harlow and Butterfield* v. *Fitzgerald*, No. 80-945.

Respectfully submitted,

ELLIOT L. RICHARDSON
ADLAI S. HARDIN, JR.
GLENN S. GERSTELL
RICHARD P. SWANSON
MILBANK, TWEED, HADLEY & MCCLOY
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